(5) (4) (2)

Nos. 86-495, 86-625, and 86-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

K MART CORPORATION, *Petitioner*

v.

CARTIER, INC., *et al.*

UNITED STATES OF AMERICA, *et al.*, *Petitioners*

v.

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

OLYMPUS CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *et al.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT 47TH STREET PHOTO, INC., IN NOS. 86-495, 86-625 AND 86-757

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All parties to the cases litigated in the District of Columbia and Second Circuit Courts of Appeals agree that there is a conflict of decisions, within the meaning of Rule 17.1(a) of this Court's Rules, as to two distinct legal issues:

(1) Whether the Court of International Trade has exclusive jurisdiction over the claim made by the plaintiffs in these cases.

(2) Whether the Customs Service lawfully issued regulations permitting parallel importation of trademarked products manufactured abroad if the foreign manufacturer and the American trademark owner are affiliated.

Both issues are important. If these questions had been presented in separate cases and had produced conflicts among the federal courts of appeals, each legal issue would independently have deserved plenary consideration by this Court.[1]

COPIAT errs in asserting that the jurisdictional issue is "of no general practical or doctrinal importance." The Federal Circuit's *Vivitar* decision, recognizing broad jurisdiction in the Court of International Trade under the residual language of 28 U.S.C. § 1581(i), has been

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[1] It is hard to take seriously COPIAT's suggestion that the legal issues are so simple that this Court may dispose of them summarily. Indeed, by taking 17 pages to defend COPIAT's "easy" propositions of law, COPIAT refutes its own proposition. Not a single district judge of the three who examined the question agreed with COPIAT on the merits; two courts of appeals disagreed. And on jurisdiction, a unanimous five-member panel of the Court of Appeals for the Federal Circuit rejected the proposition that COPIAT characterizes as beyond doubt and plain. *See* COPIAT Br., p. 7.

invoked in a number of similar situations involving important regulations and decisions of the Customs Service. *E.g.*, *National Corn Growers Ass'n v. Baker*, 623 F. Supp. 1262 (CIT 1985); *National Juice Prods. Ass'n v. United States*, 628 F. Supp. 978 (CIT 1986). If the *Vivitar* ruling is correct, such challenges will be centralized in the Court of International Trade. If the decisions below are permitted to stand, parties can avoid that court and initiate multiplicitous and repetitive suits raising identical legal issues in virtually every federal district court in the United States. The prospect alone would warrant careful examination by this Court of the jurisdictional decisions of the Second and D.C. Circuits.

This brings us to a subject that might initially be thought to be a minor question of allocation of time but is, in fact, a much more serious issue. If the petitions in Nos. 86-495, 86-624 and 86-625 are granted and no procedural directive is issued by the Court other than consolidating the three petitions for argument, the jurisdictional issue will be inadequately presented. 47th Street Photo is the *only* party challenging the jurisdictional decisions below and supporting the ruling of the Court of Appeals for the Federal Circuit in *Vivitar*. The principal petitioner—the United States—agrees with the respondents on that issue. Hence consolidation would result in a wholly unfair allotment of time on the jurisdictional issue.

There is an available procedure under which the jurisdictional question may be heard in the time it deserves, and the substantive issue—which need be reached only if the jurisdiction of the United States District Courts is upheld—can be heard thereafter. The Court could grant the petition in No. 86-624—which raises the issue of jurisdiction—only as to Question 1. It could also grant the petition in No. 86-757—the *Olympus* case that fully presents the substantive issue—and set that case to *follow* No. 86-624. In this manner, one hour will be de-

voted to the subject of jurisdiction and a second hour will relate to the substantive issue. The same agencies of the United States and the same intervenors are involved the same in both cases. The *Olympus* case was instituted by a well-known international concern that is able to represent the financial interests of opponents of parallel importation.[2]

This procedure has the additional advantage of providing an orderly sequence in the submission of briefs. Since 47th Street Photo is the only party challenging the jurisdictional ruling of the courts below, it will file the first brief on the jurisdictional question. At the same time Olympus (and any *amici*) would file briefs on the validity of the Customs Service's regulations. The United States, which supports the jurisdictional ruling below, could then file its brief on jurisdiction together with its responding brief on the substantive issues. The intervenors in the Second Circuit case would simultaneously file a brief on the substantive issues.[3] Reply briefs on jurisdiction (by 47th Street Photo, Inc.) and on the merits (by Olympus) would then be filed on the same day.

Unless the Court takes action now to insure an orderly presentation of the jurisdictional and substantive issues in these cases, it will be presented with procedural mo-

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[2] The petitions in Nos. 86-495, 86-624 (as to Question 2), and 86-625 would then be held to await disposition of the two petitions that are granted. Any private parties who are not represented in the granted cases would, of course, be able to file *amicus curiae* briefs in the case being heard.

[3] Since 47th Street Photo's position on jurisdiction, if correct, results in dismissal of the complaint—the same relief as was granted by the district court and affirmed by the Second Circuit in *Olympus*—we are not filing a cross-petition in that case. *See Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington v. Yakima Indian Nation*, 439 U.S. 462, 476 n.20 (1976); Stern, Gressman & Shapiro, Supreme Court Practice 382 (6th ed. 1986).

tions directed to the sequence of briefs and the allotment of time for oral argument. We urge the Court to consider these procedural issues in advance so that the Court can be spared such motions and parties can most effectively devote their energies to a complete and effective presentation of the important questions presented.

For the foregoing reasons, writs of certiorari should be granted on Question 1 in No. 86-624 and in No. 86-757. No. 86-757 should be set for argument to follow No. 86-624. The remaining petitions in the series should be held pending disposition of Nos. 86-624 and 86-757.

Respectfully submitted,

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